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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JACK PAYNER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 590 F.2d 206. An earlier opinion of the court of appeals (Pet. App. 12a-16a) is reported at 572 F.2d 144. The order of the district court (Pet. App. 5a-11a) is unreported. The original opinion of the district court (Pet. App. 17a-65a) is reported at 434 F. Supp. 113.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a) was entered on January 12, 1979. A petition for

rehearing was denied on March 20, 1979 (Pet. App. 4a). On April 9, 1979, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including May 18, 1979. The petition was filed on that date and was granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court possesses and should have exercised supervisory power to suppress evidence allegedly obtained as the result of an illegal search that did not violate respondent's rights under the Fourth Amendment.

STATEMENT

In September 1976, respondent was indicted in the United States District Court for the Northern District of Ohio on a charge of knowingly and willfully making a false statement in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001. In particular, respondent was accused of falsely stating on his 1972 federal income tax return that he did not have a foreign bank account, when in fact he knew that during 1972 he did have such an account at the Castle Bank and Trust Company in Nassau, Bahamas (Pet. App. 17a-18a & n.1; A. 4).[1]

[1] "A." refers to the appendix in the court of appeals.

1. The critical piece of evidence in the government's case against respondent was a loan guaranty agreement, dated April 28, 1972, in which respondent pledged the money in his Castle Bank account as security for a $100,000 loan extended by Castle Bank to Conel Development Inc., a Michigan land development project (Pet. App. 29a; A. 229). Castle Bank made the loan through one of its correspondent banks in the United States, the Bank of Perrine in Perrine, Florida (A. 159-169). The loan guaranty agreement was produced by the Bank of Perrine in response to government subpoenas, issued in April and May 1974, requesting the production of all documents concerning the Bank of Perrine's dealings with Castle Bank (Pet. App. 29a). Other important evidence was provided by Samuel Pierson, the former president of Castle Bank, who testified that at the time the loan guaranty was executed he checked the balance in respondent's account at Castle and found that it contained more than $100,000 (A. 164).

Before trial, respondent moved to suppress the loan agreement and the related testimony of Pierson and other government witnesses on the ground that the evidence had been obtained as the result of an illegal search conducted in Miami, Florida, in January 1973. The item searched was a briefcase belonging to Herbert Michael Wolstencroft, an officer of the Castle Bank who was visiting the United States.[2]

[2] The second count in respondent's indictment (A. 5) charged Wolstencroft with aiding and abetting the false statement offense by submitting to the Internal Revenue

The person primarily responsible for the search was Norman Casper, a private investigator working with the encouragement and assistance of Special Agent Richard Jaffe of the Internal Revenue Service.

Casper had met Wolstencroft several months earlier at Castle Bank's office in Nassau. Casper had traveled to the Bahamas on that occasion in an attempt to obtain information that might be helpful to the IRS in its long-standing investigation into American taxpayers' use of secret foreign bank accounts as illegal tax havens.[3] When Casper spoke with Wolstencroft in Nassau, he saw what appeared to be a computerized list of depositors' names. Casper informed Agent Jaffe of what he had seen, and Jaffe asked him to acquire a copy of the list (Pet. App. 20a; A. 226, 280-282).

After his initial meeting with Wolstencroft, Casper remained in "almost * * * constant touch" with the Castle Bank officer (A. 284). On at least two occasions prior to January 1973, Wolstencroft traveled to the United States, and Casper, at Wolstencroft's request, introduced him to women in Miami (A. 290). The second woman to whom Casper introduced Wolstencroft was Sybil Kennedy, a private investigator who had worked with Casper previously (A. 289-290). In January 1973, in conversations with Wolstencroft, Casper learned that the bank officer would be traveling through Miami on his way to Chicago and that he would be carrying a briefcase filled with important Castle Bank records (Pet. App. 21a; A. 285-286). Casper devised a plan by which he could, with Kennedy's help, obtain access to the information in the briefcase (A. 292-293).

Casper's scheme worked successfully. On January 15, 1973, Wolstencroft arrived in Miami, visited Kennedy at her apartment, and then went to dinner with her at a restaurant. While they were away, Casper entered the apartment with a key Kennedy had

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Service an affidavit confirming that respondent did not have an account at Castle Bank. Wolstencroft, a Bahamian resident, did not return to the United States to answer the indictment.

[3] The IRS investigation, known as Operation Trade Winds, began in 1965. In March 1972, IRS investigators in San Francisco, California, discovered that Allan Palmer, a suspected narcotics trafficker, had deposited into his personal bank account three checks drawn to his order by Castle Bank on its account at the American National Bank in Chicago (Pet. App. 19a; A. 215). In May 1972, the San Francisco investigators informed Agent Jaffe of their discovery and requested any information Jaffe might be able to obtain concerning the source of Palmer's funds at Castle Bank. Agent Jaffe knew that the Bank of Perrine was one of Castle Bank's correspondent banks in the United States, and he also knew that Casper was friendly with F. Eugene Poe, the President of the Bank of Perrine and one of Castle Bank's directors (A. 222-224, 244-245, 280-281). Agent Jaffe asked Casper to learn what he could about Palmer's account at Castle Bank, and Casper turned for assistance to his friend Poe. Poe introduced Casper to Pierson, the President of Castle Bank, and Pierson in turn referred Casper to Wolstencroft (A. 280). Wolstencroft informed Casper that Palmer had opened an account at Castle Bank with $15,000 deposited through the Bank of Perrine. Wolstencroft also disclosed that in June 1972 the balance in Palmer's account was $25,000 (Pet. App. 19a). Casper reported this information to Agent Jaffe, and Jaffe forwarded it to the IRS agents in San Francisco investigating Palmer (A. 216-217, 340).

supplied him and took Wolstencroft's briefcase to a locksmith, who made a key to open it. Casper then delivered the briefcase to Agent Jaffe, who supervised the copying of the Castle Bank records contained therein. Casper replaced the briefcase and its contents in Kennedy's apartment before she and Wolstencroft returned from dinner (Pet. App. 21a-24a; A. 297-300, 306-314, 348-359).[4] The IRS paid Casper $8,000 in cash for his services, and Casper in turn paid Kennedy $1,000 (Pet. App. 25a; A. 316-317, 323-324, 367-368).

Among the documents included in the briefcase were lists of Castle Bank depositors (A. 228). Respondent's name appeared on one of the lists (Pet. App. 28a; A. 236-237, 245-246, 250-251). Wolstencroft's briefcase also contained a number of documents referring to the Bank of Perrine and reflecting that bank's business dealings with Castle Bank (Pet. App. 29a; A. 255). After examining the contents of the briefcase, Agent Jaffe began to make inquiries regarding many persons whose names appeared in the photographed materials. In November 1973, when

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[4] In the week before the briefcase search, Casper told Agent Jaffe that he might be able to provide some information if Jaffe could arrange for photographic services. He also told Agent Jaffe that he would be "going into an apartment" to get a briefcase that would contain the documents to be copied (Pet. App. 21a; A. 288, 306-309, 325-326, 356, 373). Agent Jaffe obtained his supervisor's approval for the operation and arranged for another IRS agent to vouch for Casper to the locksmith whom Casper had hired to make the key for the briefcase. At the time, Agent Jaffe did not know what use Casper planned to make of the locksmith (Pet. App. 21a-22a; A. 308-311, 350-351, 356, 373).

Agent Jaffe contacted the IRS district office in Cleveland, Ohio, and asked about respondent, he learned that respondent had already been under investigation for nearly nine months for possible criminal income tax violations during the years 1968 through 1971 (Pet. App. 29a; A. 238). Agent Jaffe reported that he had "unsubstantiated information" indicating that respondent maintained an account at Castle Bank (A. 261-262). IRS Special Agent Joseph Sabol, the case agent from Cleveland, visited Agent Jaffe in Miami, and Jaffe showed him a copy of the Castle Bank depositor list that included respondent's name (A. 262-264). After reviewing this material and the other information it had gathered concerning respondent's tax returns for 1968 through 1971, the IRS Cleveland office discontinued its criminal investigation due to insufficient evidence (A. 104, 242, 256-259, 264). The final report that concluded the investigation was dated April 9, 1974 (Pet. App. 29a; A. 264).

Thereafter, the Department of Justice began a grand jury investigation in Miami into possible criminal tax violations involving the improper use of secret foreign bank accounts (A. 239). In late April and early May 1974, the grand jury issued subpoenas to the Bank of Perrine requesting the production of all records pertinent to the bank's dealings with Castle Bank (Pet. App. 29a; A. 240). The critical loan guaranty agreement was produced in response to one of these subpoenas and, in July 1974, Agent Jaffe notified the IRS Cleveland district office of the discovery of evidence of respondent's Castle Bank

account. As a result of this new information, the Cleveland office in October 1974 opened the investigation that led to respondent's indictment (Pet. App. 29a-30a; A. 111, 229-232, 240-241, 265).

2. In view of respondent's waiver of his right to a jury trial, the district court, with the agreement of the parties, decided to consolidate its consideration of respondent's pretrial motion to suppress with the trial on the merits (Pet. App. 18a & n.2). The government did not introduce or attempt to introduce any of the materials taken from Wolstencroft's briefcase and photographed in January 1973. At the close of the evidence, the district court concluded that respondent lacked standing under the Fourth Amendment to challenge the legality of the 1973 search (*id.* at 38a-39a, 46a n.65). The court stated that respondent "possessed no privacy interest in the Castle Bank documents seized from Wolstencroft" (*id.* at 38a). Nonetheless, the court suppressed the loan guaranty agreement and "the testimony of all the Government's witnesses as it related to information discovered as a result of the guarantee" (*id.* at 66a). The only government evidence not suppressed was respondent's 1972 tax return and the testimony relating to that document (*ibid.*).

The district court held first that the disputed evidence, although not obtained in or derived directly from the search, was tainted by the search's illegality (Pet. App. 30a-32a, 63a-64a). The court ruled that the government "did not meet its burden to show that [the critical evidence] was the product of an investigation *independent* of the information taken"

in the illegal search (*id.* at 30a). The court further held that the government agents' conduct in encouraging and performing the illegal search demonstrated a "knowing and purposeful *bad faith hostility* to [a] person's fundamental constitutional rights" (*id.* at 46a, 48a-50a, 56a). Accordingly, the court concluded, the Due Process Clause of the Fifth Amendment requires suppression of the challenged evidence, notwithstanding respondent's inability to assert any violation of his rights under the Fourth Amendment (*id.* at 46a-48a n.65, 55a-56a).

In the alternative, the district court held that "the federal courts' supervisory power over federal prosecutions should be invoked to exclude evidence obtained by Governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right" (Pet. App. 58a-61a; footnotes omitted). The court ruled that the government's action in connection with the search of Wolstencroft's briefcase satisfied these criteria and that therefore all evidence obtained as a result of the search "must be excluded under this Court's supervisory function" (*id.* at 63a). The court candidly acknowledged (*id.* at 57a n.72) that it relied on the Due Process Clause as well as its supervisory power "because the Government might well argue that supervisory power to exclude is limited to these instances specified under the federal criminal rules." [5]

[5] Initially, the district court did not enter a verdict. The government asked the court to vacate its order suppressing the loan guaranty agreement, to reach a verdict based on all

3. The court of appeals affirmed in a brief per curiam opinion. The court's entire discussion of the validity of the district court's suppression order was as follows (Pet. App. 2a):

> Upon consideration of the briefs and arguments of counsel and the entire record, we conclude that the district court did not err in suppressing the evidence in the exercise of its supervisory powers. We agree with the district court that suppression was justified. Since we base our decision upon the exercise of supervisory powers, it is not necessary to reach the constitutional questions raised on the appeal.

The court did not address the government's contention that the disputed evidence was not tainted by the search of Wolstencroft's briefcase.

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the evidence, and then, if the verdict were guilty, to consider anew its decision on respondent's motion to suppress and to set aside the conviction if the court continued to believe that the motion should be granted and there was no sufficient independent evidence to support the verdict (A. 60-64). The court refused because it believed its suppression order was appealable before verdict. The government then appealed and also filed a petition for a writ of mandamus, seeking to compel the district court to follow the course described in the government's posttrial motion and thereby to preserve the government's right to appeal. The court of appeals dismissed the appeal for lack of jurisdiction and denied the petition for a writ of mandamus (Pet. App. 12a-16a). When the case was returned to the district court, that court vacated its earlier order suppressing the evidence, entered a verdict of guilty, and then reinstated its suppression order and set aside the verdict (*id.* at 5a-11a).

SUMMARY OF ARGUMENT

I

Congress has provided that federal courts may properly exclude relevant evidence only in order to implement the Constitution, a statute, or a statutorily authorized rule. "Congress has undoubted power to regulate the practice and procedure of federal courts" (*Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941)), and it has exercised that power in enacting Fed. R. Evid. 402. Rule 402 provides that all relevant evidence is admissible, "except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." The legislative history of Rule 402 demonstrates that the Rule was carefully drawn to confine the exclusion of relevant evidence to those occasions when it could be justified under one of the specifically enumerated exceptions to the general principle of admissibility.

The district court and court of appeals have suppressed critical evidence of respondent's guilt, even though, as the district court conceded, none of respondent's rights were violated by the search of Wolstencroft's briefcase. The court of appeals acted solely on the basis of its "supervisory power" and did not review the district court's alternative holding that use of the loan guaranty agreement and related testimony against respondent at trial would violate his rights under the Due Process Clause of the Fifth

Amendment. The court of appeals thus sustained the exclusion of relevant evidence on grounds wholly independent of the Constitution, federal statutes, and rules prescribed by this Court under statutory authority. This departure from the clear command of Fed. R. Evid. 402 should be rejected.

II

Even assuming that Rule 402 does not preclude the suppression of relevant evidence for reasons other than those expressly mentioned therein, the court of appeals erred in exercising its supervisory power in this case. The court's holding was inconsistent with numerous decisions of this Court establishing that only persons who have themselves been the victims of an illegal search or seizure are entitled to invoke the exclusionary rule as a sanction for the Fourth Amendment violation. See, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969). Here, respondent's Fourth Amendment rights were not violated by the search of Wolstencroft's briefcase. Respondent had no privacy interest in the contents of the briefcase and, indeed, the record does not suggest that respondent even knew Wolstencroft or was aware of his business trip to the United States. The court of appeals has thus used its supervisory power to accomplish a result contrary to that ordained by this Court's decisions under the Fourth Amendment, the very constitutional provision designed to protect against unreasonable searches and seizures. The supervisory

power should not be employed to avoid this Court's salutary restrictions on the applicability of the exclusionary rule as a Fourth Amendment remedy.

Viewed apart from the Fourth Amendment context, the court of appeals' ruling is improper, because it represents a judicial attempt to supervise the investigative activities of Executive Branch officers by reference to standards not provided by Constitution, statute, or rule, but developed by the courts themselves. Where the focus of inquiry has been law enforcement officers' conduct outside the judicial arena, this Court has never imposed sanctions solely on the basis of judicial aversion to or displeasure with police tactics. Rather, evidence has been excluded only where the challenged official behavior has violated some policy embodied in a constitutional provision, a statute, or a federal rule. See, *e.g.*, *McNabb* v. *United States*, 318 U.S. 332 (1943); *Mallory* v. *United States*, 354 U.S. 449 (1957). To the extent the court of appeals has asserted a power to exclude relevant evidence whenever it is obtained through police investigative conduct that is objectionable only because it does not comport with a judicial sense of propriety, the court has displayed an inadequate regard for the constitutional separation of powers, and its decision should be reversed.

This conclusion is especially compelling because the court of appeals' summary opinion gives the district courts in the Sixth Circuit no guidance concerning the appropriate occasions for future exercise of the supervisory power. Assuming such judicial power

exists at all in circumstances like those presented here, it should be used only to set clear standards of acceptable conduct that will govern in later cases. The court of appeals' failure to provide such instruction suggests that the court incorrectly viewed the supervisory power as a justification for the exercise of an essentially ad hoc judicial veto over distasteful police practices.

ARGUMENT

I

CONGRESS HAS VALIDLY RESTRICTED THE GROUNDS FOR EXCLUSION OF RELEVANT EVIDENCE IN THE FEDERAL COURTS TO ENFORCEMENT OF THE CONSTITUTION, A STATUTE, OR A STATUTORILY AUTHORIZED RULE

A. Congress Is Empowered To Enact Legislative Criteria Governing The Admission Of Evidence In Federal Trials

The supervisory power of the federal courts is merely one aspect of the more general judicial power to establish rules of procedural and substantive law in appropriate cases when neither the Constitution nor Congress has answered the particular question at issue. Courts typically have invoked the phrase "supervisory power" in the context of cases raising questions about the proper administration of judicial proceedings. See, *e.g.*, *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 599 (1978) (approving district court's discretionary denial of public access to its own records and files); *United States* v. *Hale*, 422

U.S. 171, 180-181 & n.7 (1975) (barring cross-examination of criminal defendant about his silence at time of arrest); *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion) (requiring jury trial or waiver thereof as precondition to sentence of more than six months in federal criminal contempt proceeding); *Offutt* v. *United States*, 348 U.S. 11, 13 (1954) (ordering retrial of contempt proceeding before different judge); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225 (1946) (forbidding systematic exclusion of daily wage earners from federal jury panel); *Mortensen* v. *United States*, 322 U.S. 369, 371-372 (1944) (treating district court transcript as part of appellate record despite failure to file a timely bill of exceptions); *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 676-678 (1944) (restoring judgment of district court where Supreme Court review of court of appeals' reversal was frustrated by dissolution of corporate respondent).

But these cases do not by any means exhaust the occasions on which federal courts have made legal rulings in the absence of controlling constitutional or statutory commands. In numerous such instances, the court's opinion has made no reference to "supervisory power," [6] and sometimes such a reference has

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[6] See, *e.g.*, *Weeks* v. *United States*, 232 U.S. 383 (1914) (implementing Fourth Amendment by suppressing evidence obtained in illegal search by federal officer); *Brown* v. *United States*, 256 U.S. 335 (1921) (prescribing self-defense instruction making failure to retreat only one circumstance to be considered in determining whether defendant's use of force was justifiable); *Clearfield Trust Co.* v. *United States*,

been omitted even where the decision plainly concerned the proper method of conducting a judicial proceeding. See, *e.g.*, *Funk* v. *United States*, 290 U.S. 371 (1933) (establishing federal evidentiary rule that a wife is competent to testify on behalf of her husband); *Aldridge* v. *United States*, 283 U.S. 308 (1931) (regulating voir dire by requiring trial court to examine prospective jurors about possible racial prejudice); *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896) (approving supplementary jury instruction urging dissenting jurors to reexamine their views "with a proper regard and deference" to the opinion of the majority).

On the other hand, courts have on some occasions explicitly invoked their supervisory power even where their primary objective was undoubtedly the enforcement of some behavioral standard governing conduct

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318 U.S. 363 (1943) (describing rights of United States as drawee of commercial instrument bearing forged endorsement of payee); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) (recognizing district court's power to compel arbitration of labor dispute); *Woodby* v. *INS*, 385 U.S. 276, 284-286 (1966) (establishing proper burden of proof in administrative deportation proceeding); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) (recognizing private action against individual federal officers as available method for enforcing Fourth Amendment); *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (establishing priority rules for ordering private liens and federal contractual liens arising from government loan programs). See generally P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 756-832 (2d ed. 1973); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

outside the judicial arena. See, *e.g.*, *McNabb* v. *United States*, 318 U.S. 332 (1943) (suppressing confession obtained after two days of custodial interrogation prior to arraignment, a police practice found to violate a federal statute); *Rea* v. *United States*, 350 U.S. 214, 216-217 (1956) (enjoining federal officer from testifying in state criminal case about evidence obtained from defendant's premises during federal search supported by warrant improperly issued under Fed. R. Crim. P. 41(c)); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960) (in federal criminal trial, suppressing evidence illegally obtained by state officers in search that violated the Fourteenth Amendment).

This survey suggests that the federal courts' supervisory power, properly viewed, is not some special judicial creation superimposed on the power to resolve individual cases and controversies, but is merely a somewhat ill-defined segment of that power. It is an aspect of the courts' power most frequently mentioned in cases involving matters of judicial administration, but at times invoked to justify the implementation of constitutional or statutory provisions through means not prescribed by the Framers or Congress. In short, if the supervisory power is distinctive in any way, it is so not as a special *kind of power*, but rather as a label that denotes the exercise of judicial power in a certain *kind of case*, *i.e.*, a case in which the matter at issue is an element of judicial procedure not directly regulated by Constitution, statute, or rule.

Nothing in the Constitution excepts such subject matter from the legislative powers otherwise conferred on Congress or provides that the judiciary is vested with the ultimate lawmaking power in such areas. It is, instead, well established that Congress is constitutionally empowered to prescribe rules of evidence, consistent with constitutional guarantees, as a necessary and proper adjunct to the exercise of the powers that enable it to proscribe federal criminal offenses and to provide for their prosecution in federal courts. See, *e.g.*, *Hawkins* v. *United States*, 358 U.S. 74, 78 (1958).

It follows that, where either the Constitution or Congress has spoken, courts are not free to substitute their own rules of decision merely because they believe that, as an a priori matter, some alternative to the constitutional or statutory scheme is preferable. Because the supervisory power is simply an aspect of the general judicial power to decide cases and controversies, it does not entail any authority to displace legislative rules in favor of judicially-created ones, except perhaps when a court finds that a statute violates the Constitution. Supervisory or otherwise, the judicial power to fashion legal rules is subordinate to the paramount authority of Congress to legislate within constitutional bounds. That congressional authority includes the power to prescribe the practices and procedures that will govern trials in the federal courts. See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1940). As the Court observed in *United States* v. *National City Lines*, 334 U.S. 573, 589 (1948),

"[o]ur general power to supervise the administration of justice in the federal courts * * * does not extend to disregarding a validly enacted and applicable statute or permitting departure from it * * *." Accord, *Palermo* v. *United States*, 360 U.S. 343, 353 n. 11 (1959) ("The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress"); *Gordon* v. *United States*, 344 U.S. 414, 418 (1953); *Upshaw* v. *United States*, 335 U.S. 410, 414-415 (1948) (dissent); *Wolfle* v. *United States*, 291 U.S. 7, 13 (1934); *Funk* v. *United States*, *supra*, 290 U.S. at 374-375, 379, 382; *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 61 (1825). See also Hill, *The Bill of Rights and The Supervisory Power*, 69 Colum. L. Rev. 181, 203 & n.124 (1969); Comment, *Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of Federal Courts*, 72 Nw. U. L. Rev. 595, 628 (1977).

The first critical question, then, with respect to the court of appeals' exercise of supervisory power in this case is whether that action runs counter to a specific congressional command. We submit that it does.

B. Rule 402 Of The Federal Rules Of Evidence Prohibits The Suppression Of Relevant Evidence, Except Pursuant To Statute, Constitution, Or Statutorily Authorized Rule

When *Funk* v. *United States*, *supra*, was decided in 1933, its primary significance lay in its rejection

of the proposition that the rules of evidence applicable in a federal criminal trial must track the common-law rules existing in the state in which the trial was held at the time that state was admitted to the Union. 290 U.S. at 379-380. Instead, *Funk* affirmed the power of the federal courts, "in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common-law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced." *Id.* at 383.[7]

In 1940, Congress authorized this Court to prescribe "rules of pleading, practice, and procedure" for federal criminal cases (54 Stat. 688, 18 U.S.C. (1940 ed.) 687), and in 1945, the Court codified the holding in *Funk* by promulgating Fed. R. Crim. P. 26, 18 U.S.C. (1970 ed.) App., page 4502. The second sentence of Rule 26 provided:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

The accompanying Advisory Committee Note acknowledged the Rule's relationship to *Funk* and

[7] For a contemporary appraisal of the significance of *Funk*, see Note, *Rules of Evidence in Federal Criminal Trials*, 47 Harv. L. Rev. 853 (1934).

stated that the Rule "contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal courts." For the next 30 years, the federal courts labored, with only limited success, to achieve this goal by fashioning and applying appropriate evidentiary standards on a case-by-case basis. See Special Committee on Evidence, Judicial Conference of the United States, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 73, 92, 98-100 (1962).[8]

[8] In *Michelson* v. *United States*, 335 U.S. 469, 486 (1948), this Court described its own special problems in exercising meaningful control over the development of evidentiary rules in the lower federal courts:

> This Court * * * has contributed little to * * * the law of evidence, for the reason, among others, that it has had extremely rare occasion to decide such issues, as the paucity of citations in this opinion to our own writings attests. It is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be.
>
> We concur in the general opinion of courts, textwriters, and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.

See also *id.* at 487-488 (Frankfurter, J., concurring).

The situation changed dramatically in 1975, when Congress enacted the Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926. The Rules manifested a congressional intent to prescribe a uniform code of evidence for use in the federal courts and to limit the occasions on which common-law development of evidentiary rules by the courts themselves would be necessary or appropriate. Adoption of the Rules eliminated the authority of the federal courts to render evidentiary decisions at odds with the standards set by Congress. This Court witnessed the shift as early as 1972 when, in conjunction with the promulgation of its proposed Rules of Evidence, it adopted the Advisory Committee's recommendation that Fed. R. Crim. P. 26 be amended to change its title from "Evidence" to "Taking of Testimony" and to delete the second sentence of the Rule, reprinted above (page 20, *supra*). See 56 F.R.D. 183, 359 (1972); 51 F.R.D. 315, 472 (1971). The Advisory Committee explained that the sentence should be deleted "because the Rules of Evidence govern admissibility of evidence, competency of witnesses, and privilege." When Congress enacted the Rules of Evidence into law, it "expressly approve[d]" the amendment to Fed. R. Crim. P. 26, thus reflecting the legislative understanding that the Rules would displace the common-law judgments of the courts on evidentiary matters. 88 Stat. 1949; H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 1 (1973).

For purposes of the present case, the key provision in the Federal Rules of Evidence is Rule 402. The Rule states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

This Rule prohibits the exercise of any supervisory power that the district court might otherwise have invoked in respondent's trial to suppress the evidence derived from the search of Wolstencroft's briefcase. The Rule was designed to bar the exclusion of relevant evidence, except where such judicial action is deemed appropriate for the enforcement of a constitutional provision, a statute, or a statutorily authorized rule. The court of appeals in this case expressly disclaimed any reliance on the Constitution, and neither the district court nor the court of appeals suggested that the loan guaranty agreement signed by respondent should be suppressed in order to implement a federal statute or a rule prescribed by this Court pursuant to statutory authority.[9] Accordingly, the court of appeals' decision was incorrect.

The limited legislative history of Rule 402 shows that Congress chose its language carefully and in-

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[9] Fed. R. Crim. P. 41 provides that a person aggrieved by an unlawful search and seizure may move to suppress evidence obtained as the result of the illegality, but neither the district court nor the court of appeals suggested that respondent was aggrieved, within the meaning of Rule 41, by the search of Wolstencroft's briefcase. See *Alderman* v. *United States*, 394 U.S. 165, 173 n.6 (1969); *United States* v. *Calandra*, 414 U.S. 338, 348-349 n.6 (1974).

tended to prohibit the suppression of relevant evidence, unless grounded in some constitutional or statutory authority. See C. Wright and K. Graham, *Federal Practice and Procedure: Evidence* §§ 5191, 5192, 5199, at 173-180, 219-226 (1978 ed.). That is the entire purpose of Rule 402 and other similar provisions in recently revised state evidentiary codes. The point was to wipe the slate clean of judicially-created limitations on the admissibility of relevant evidence and to insist that in the future all relevant evidence should be admitted, subject only to those exceptions required by, or designed to implement, the Constitution, a statute, or a statutorily authorized rule. As the Advisory Committee explained, Rule 402 "constitute[s] the foundation upon which the structure of admission and exclusion rests." The Committee explicitly described the kinds of circumstances in which relevant evidence might be excluded in accordance with Rule 402:

> Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

No mention was made of suppression based solely on a common-law rule developed in the exercise of a court's supervisory power. See 1 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 402[01], at 402-8 (1978 ed.) (treating Rule 402's enumeration of the possible grounds for exclusion of relevant evidence as exhaustive).

As transmitted to Congress by this Court, Rule 402 provided (56 F.R.D. at 216):

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

The House Judiciary Committee modified this draft to replace the phrase "other rules adopted by the Supreme Court" with the current version, "other rules prescribed by the Supreme Court pursuant to statutory authority." The Committee explained that the change was made "[t]o accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence * * *." H.R. Rep. No. 93-650, *supra*, at 7. The Committee's remark referred, of course, to the Court's promulgation of the proposed Rules of Evidence in 1972 pursuant to the rulemaking authority conferred by 18 U.S.C. 3771, 3772, and 3402 and 28 U.S.C. 2072 and 2075. See 56 F.R.D. 183, 184 (1972).

By revising the language of the Court's proposed Rule 402, therefore, Congress wished to emphasize that any additions to or modifications of the Rules of Evidence as enacted into law could be made only in accordance with the new procedure established by 28 U.S.C. 2076, enacted as part of the same statute that contained the Rules themselves. 88 Stat. 1948. Unlike the previously existing rules enabling acts, 28 U.S.C. 2076 requires a 180-day "layover" period

between the time proposed amendments to the Rules of Evidence are reported to Congress by the Court and the time the amendments become effective.[10] More important, 28 U.S.C. 2076 is unique among the rules enabling provisions in that it authorizes either House of Congress to defer the effective date of any proposed amendment until a date later than the expiration date of the ordinary layover period or until the amendment is approved by Act of Congress. The statute is further distinguished by its inclusion of a so-called "one-house veto" provision, permitting either House of Congress to block the effectiveness of a proposed amendment by passing a resolution of disapproval. Finally, Section 2076 flatly declares that, in one particular area, *only* a statute can change the existing Rule. The enabling provision states that any proposed amendment "creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress." [10a]

The congressional purpose underlying the enactment of Section 2076 is readily apparent from this description of the procedures prescribed for amend-

[10] Ninety-day layovers are required by 18 U.S.C. 3771 and by 28 U.S.C. 2072 and 2075. No layover provision is included in 18 U.S.C. 3402 or 3772.

[10a] Of course, as we discuss at pages 31-32, *infra*, Fed. R. Evid. 501 explicitly contemplates case-by-case judicial development of rules concerning evidentiary privileges. The relevant sentence in Section 2076, therefore, may be somewhat misleading if read alone. Together, Rule 501 and Section 2076 permit the federal courts to fashion rules of privilege in individual cases but require a statute if any such common-law rule is to be codified as part of the Federal Rules of Evidence.

ing the Federal Rules of Evidence. Congress sought to retain a greater measure of direct control over the rulemaking process than it had provided in earlier rules enabling acts. See H.R. Rep. No. 93-650, *supra*, at 18. And, as we have seen, the House Judiciary Committee revised the Court's proposed version of Rule 402 to stress that future changes in the Rules of Evidence can be accomplished only in accordance with Section 2076 and not by following any of the less rigorous reporting and layover procedures deemed adequate in other areas of judicial rulemaking. In light of Congress' obvious concern that the detailed legislative scrutiny contemplated by Section 2076 not be circumvented or diluted through reliance on some other rules enabling measure, it is inconceivable that Congress could have intended to permit the federal courts, after the effective date of the Rules, to exclude relevant evidence whenever such a course commended itself, viewed as a policy matter of first impression. On the contrary, if Congress thought it necessary to redraft Rule 402 to stress the exclusive applicability of Section 2076 as opposed to other rules enabling statutes (the most important ones of which did, after all, entail some degree of structured legislative supervision),[11] it follows a fortiori that Congress did not expect or want the federal courts to be making changes in or addi-

[11] The enabling acts for the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure both contain 90-day layover provisions designed to permit Congress to review Rules proposed by the Court and to take appropriate legislative action if it finds such proposals unsatisfactory. See 28 U.S.C. 2072; 18 U.S.C. 3771.

tions to the Federal Rules of Evidence on a case-by-case basis, completely outside the scope of the specially devised procedure for congressional monitoring and control.

Although Rule 402 was not the subject of extensive consideration during the congressional floor debates and committee hearings on the Rules of Evidence, the available materials strongly support the view that, at least with respect to matters directly addressed (such as the set of acceptable justifications for the exclusion of relevant evidence), enactment of the Rules precluded future judicial additions or amendments through decisions in individual cases. A colloquy on the floor of the House between Representative Hutchinson and Representative Smith, two of the ranking minority members of the House Judiciary Committee, leaves little doubt of the congressional understanding on this point. See 120 Cong. Rec. 1413-1414 (1974) (because of the length of the exchange, we have reproduced it in the margin).[12] Likewise, testimony

[12] Mr. HUTCHINSON. There is one problem that occurs to me. Since in the past the rules of evidence have evolved and changed over a period of time, I want to inquire as to what the effect of putting them into statutory form will be. Will this effectively freeze them so that there can be no changes in the rules of evidence henceforth except by coming back to Congress and asking Congress to amend the statute?

Mr. SMITH of New York. As I understand the gentleman, the bill provides that the Supreme Court may from time to time recommend to the Congress changes in the rules of evidence or perhaps proposals for rules of evidence in areas which we do not now perceive, and that those new or amended rules of evidence shall become part of the codified rules after 180 days, if I remember correctly, from submission to the Congress, unless they are vetoed by either House within that

before the Senate Judiciary Committee by Judge Albert B. Maris, Chairman of the Standing Committee

time. We have tried to provide for the growth and expansion of the law of evidence but with some check on it so that the Congress can look at it and make a decision.

Mr. HUTCHINSON. I thank the gentleman. Let me put one more question. Will it be possible henceforth for there to be additional rules of evidence, that is, that there will continue to grow within each of the several circuits some additional evidentiary rules which might not be codified and which might not be submitted to the Supreme Court, and there will perhaps be in the future some evidentiary rules which will not be uniform throughout the country because they will grow up differently in the various circuits?

Mr. SMITH of New York. I think the gentleman is correct in that statement and I can foresee, for instance, in areas in which the codified rules of evidence may not cover, that there, as the new question occurs in a court, the judge of that court will make a rule to cover the occurrence and to cover the admission or nonadmission of that evidence in that particular court and that particular case. I suppose to that extent the law of evidence will grow in that way. It will be as it has been in the past, those rules have been subject to review by superior courts and finally will become to be the accepted and uniform rule at least to the extent the Supreme Court makes a final determination for the whole country. Otherwise, there may be some different rules in some different courts in regard to those positions which may not have been covered by the present law.

Mr. HUTCHINSON. But so far as the codification itself is concerned it would not be possible legally for a judge in any court to provide a rule of evidence at variance with this modification. So far as the codification reaches, it will be uniform throughout the country.

Mr. SMITH of New York. I would say to the gentleman that is correct. In many of the rules that we have proposed, the judges have a certain amount of discretion as to whether to allow evidence in or out depending upon the cases as outlined in the codified rule.

It would be my answer that a judge would not be able to hold adversely to the codified rules of evidence and that the

on Rules of Practice and Procedure of the Judicial Conference of the United States throughout the drafting of the Rules of Evidence, recognizes that changes in the Rules are to be made, not through case-by-case adjudication, but through the procedure established in 28 U.S.C. 2076. *Rules of Evidence: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 43 (1974). See also *id.* at 82, 100-101, 199. Finally, Professor Richard H. Field, in comments submitted to the House Judiciary Committee, remarked explicitly on the effect of the Committee's revision of the Court's proposed Rule 402. Rather than the phrase "other rules prescribed by the Supreme Court pursuant to statutory authority," Professor Field would have preferred "other rules lawfully prescribed by the Supreme Court." He explained that this alternative would not "foreclose the argument for inherent power" to make rules of evidence on a case-by-case basis. *Rules of Evidence* (*Supplement*): *Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., 269 (1973). Congress took no action in response to Professor Field's suggestion.

None of the foregoing is intended to suggest that the Rules of Evidence, as enacted, are without flexibility. The point, rather, is that the flexibility intended by Congress is the flexibility built into the Rules, and no more. Where the issue is the quality

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only way those could be changed would be through further legislation. In the event that some rule turns out in practice to be one that reasonable people would agree ought to be changed, it would be subject to further legislation for amendment.

of relevant evidence and the extent of its probable contribution to the ascertainment of truth, Congress has provided ample safety valves to ensure that federal district courts retain sufficient discretionary control over the proceedings before them. Fed. R. Evid. 403 expressly authorizes courts to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Conversely, the two so-called "wild card" exceptions to the hearsay rule (Fed. R. Evid. 802) permit courts to admit otherwise inadmissible hearsay statements whenever such statements have "circumstantial guarantees of trustworthiness" equivalent to those reflected in the recognized hearsay exceptions and the court finds that no other reasonably available evidence will be equally probative of the material fact at issue and that the interests of justice will best be served by admission of the hearsay statement. See Fed. R. Evid. 803(24), 804(b)(5). See also S. Rep. No. 93-1277, 93d Cong., 2d Sess. 18-20 (1974); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 12-13 (1974).

Even where the inquiry concerns not the quality of relevant evidence but a policy judgment extrinsic to the accuracy of the fact-finding process, Congress has, in one important area, left the development of evidentiary rules to the courts. After extended debate, Congress refused to enact the rules proposed by this Court regarding evidentiary privileges (see 56 F.R.D. at 230-261) and instead provided that questions of privilege in federal cases ordinarily "shall be gov-

erned by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. This Rule, patterned after the deleted second sentence of former Fed. R. Crim. P. 26 (see page 20, *supra*), was intended "to leave the Federal law of privilege where [Congress] found it" and to avoid the perceived difficulties in the Court's proposal by allow-by-case basis. 120 Cong. Rec. 40,891 (1974) (remarks ing judicial development of privilege rules on a case-of Rep. Hungate, Chairman of the House Judiciary Subcommittee responsible for the Rules of Evidence); H.R. Rep. No. 93-650, *supra*, at 8-9; S. Rep. No. 93-1277, *supra*, at 11; Brief for the United States at 9-10, *Trammel* v. *United States*, No. 78-5705 (argued Oct. 29-30, 1979).

Indeed, Rule 402 itself necessarily contemplates a substantial degree of judicial latitude in deciding whether relevant evidence should be suppressed in particular cases. The Rule stops far short of identifying specifically every set of circumstances in which suppression of relevant evidence is permissible or required. Rather, the drafters left to the courts the numerous difficult and often dispositive questions concerning the propriety of excluding relevant evidence as a method of implementing the Constitution, a federal statute, or a statutorily authorized rule.[13]

[13] The Advisory Committee's Note to Rule 402 (56 F.R.D. at 216-218 (1972)) demonstrates that the drafters expected the courts to decide when the effective enforcement of a particular constitutional provision, statute, or rule requires the suppression of relevant evidence. As examples of the kinds of judicial rulings the drafters intended to permit, the Note cites *Mallory* v. *United States*, 354 U.S. 449 (1957) (implementing Fed. R. Crim. P. 5(a)'s prohibition of "unnecessary delay" between arrest and arraignment by suppressing a confession obtained during such a delay); *Weeks* v. *United States*, 232 U.S. 383 (1914) (implementing the Fourth Amendment by suppressing evidence obtained through an unlawful search and seizure); and *Massiah* v. *United States*, 377 U.S. 201 (1964) (implementing the Sixth Amendment right to counsel by suppressing a confession obtained in the absence of defendant's attorney).

But Congress did resolve one critical point. By enacting Rule 402, it settled that relevant evidence could not be excluded without some constitutional or statutory justification. As to this, Congress intended no flexibility and provided none. The Rule was adopted precisely in order to establish the basic principle that all relevant evidence is admissible, unless there is some ground for suppression in the Constitution, a statute, or a statutorily authorized rule. This is the sense in which the Advisory Committee declared that Rule 402 is "the foundation upon which the structure of admission and exclusion rests." If Rule 402 does not have the meaning attributed to it here, it means nothing at all. If the court of appeals' decision is correct, and federal courts are nonetheless free to exclude relevant evidence whenever they believe it is fitting to do so, then the first sentence of Rule 402 could just as easily read, "All relevant evidence is admissible, unless a court decides otherwise." This could not have been Congress's intent, and the court of appeals accordingly erred in affirming the district court's exercise of supervisory power to suppress re-

spondent's loan guaranty agreement and the related testimony of government witnesses.

II

EVEN IF THE FEDERAL RULES OF EVIDENCE DO NOT RESTRICT JUDICIAL AUTHORITY TO EXCLUDE RELEVANT EVIDENCE, THE COURTS BELOW SHOULD NOT HAVE EXERCISED THEIR SUPERVISORY POWER TO SUPPRESS THE CRITICAL EVIDENCE IN THIS CASE

A. The Supervisory Power Should Not Be Used To Reach Results Inconsistent With This Court's Decisions Under The Fourth Amendment

When the district court invoked its supervisory power to exclude evidence allegedly derived from the seizure of Wolstencroft's briefcase, the court candidly acknowledged (Pet. App. 38a-40a) that, as a matter of Fourth Amendment law, respondent was not entitled to succeed on his motion to suppress. The court stated that respondent "possessed no privacy interest in the Castle Bank documents that were seized from Wolstencroft" (*id.* at 38a) and that he therefore "has no standing under the Fourth Amendment to raise the illegality of the seizure of Wolstencroft's briefcase" (*id.* at 39a). After reviewing the relevant precedents from this Court, the district court correctly concluded (*id.* at 39a-40a n.61) that "only a party whose expectation of privacy has been violated may raise the unconstitutionality of a search and seizure under the Fourth Amendment." The court of appeals, too, proceeded on the assumption that suppression was not warranted under the Fourth

Amendment. Nonetheless, both lower courts held that, because the briefcase search was unlawful, evidence obtained as a result could properly be excluded in respondent's prosecution through an exercise of the supervisory power. This was error.

In its decisions interpreting and applying the Fourth Amendment, this Court has repeatedly observed that the exclusionary rule is a judicially created remedy that should not be extended beyond the areas in which "its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). The rule "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Ibid.* Instead, the Court has examined the nature and purposes of the exclusionary rule in a variety of factual and procedural contexts and has concluded on several occasions that the potential benefits to be derived from application of the rule are outweighed by the negative impact that the exclusion of relevant (and often highly probative) evidence is likely to have on the ability of courts to ascertain the truth and effectively to enforce the laws. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 564, 485-489 (1976) (claim that exclusionary rule should have been applied to exclude illegally seized evidence in state criminal trial not cognizable in federal collateral attack on resulting conviction, unless defendant was deprived of full and fair opportunity to litigate his claim in state proceeding); *United States* v. *Pel-*

tier, 422 U.S. 531, 535-539 (1975), and cases cited therein (refusing to apply exclusionary rule decisions retroactively); *United States* v. *Calandra*, *supra*, 414 U.S. at 347-352 (grand jury witness may not refuse to answer questions on ground that they are based on illegally seized evidence); *Walder* v. *United States*, 347 U.S. 62 (1954) (evidence obtained in unlawful search may be used to impeach defendant who voluntarily testifies on his own behalf). See also *United States* v. *Ceccolini*, 435 U.S. 268, 275-279 (1978); *United States* v. *Janis*, 428 U.S. 433, 448, 453-454, 457-560 (1976).

For present purposes, the most important manifestations of the Court's effort to set appropriate limits on the applicability of the exclusionary rule are the numerous decisions holding that the rule's deterrent purpose is adequately served if unlawfully obtained evidence is subject to suppression only at the instance of persons who have themselves been victims of the challenged search or seizure. See *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978) ("since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, * * * it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections"); *Brown* v. *United States*, 411 U.S. 223, 229-230 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174 (1969); *Simmons* v. *United States*, 390 U.S. 377, 389 (1968); *Wong Sun* v. *United States*, 371 U.S. 471, 492 (1963); *Jones* v.

United States, 362 U.S. 257, 261 (1960).[14] As the Court explained in *Alderman*, *supra*, 394 U.S. at 174-175,

> [t]he deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

See also *Elkins* v. *United States*, *supra*, 364 U.S. at 216 ("any apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice").

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[14] In *Rakas* v. *Illinois*, *supra*, 439 U.S. at 132-138, this Court rejected the argument that an exclusionary remedy should be available to persons who, like respondent, claim to be "targets" of an illegal seizure but can allege at most a violation of another person's Fourth Amendment rights. The Court observed that permitting the assertion of vicarious Fourth Amendment claims "would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials," a result that would "exact[] a substantial social cost" by keeping relevant and reliable evidence from the trier of fact and deflecting the search for truth in judicial proceedings (*id.* at 137). The Court also emphasized the administrative difficulties that adoption of a "target" rule of standing inevitably would entail (*id.* at 136-137).

The Court's salutary restriction on the category of persons who can avail themselves of an exclusionary remedy should not be abandoned under the rubric of supervisory power. The Fourth Amendment is the constitutional provision that is directly concerned with protecting persons from unreasonable searches and seizures; district courts should not be permitted to employ their supervisory power to redress unlawful searches by providing an exclusionary remedy in circumstances in which this Court has decided that such relief is an inappropriate means of enforcing the very constitutional provision that governs the legality of searches. See *United States* v. *Baskes*, 442 F. Supp. 322, 333-334 (N.D. Ill., 1977), appeal pending, No. 77-2178 (7th Cir.) (refusing to suppress evidence allegedly obtained as a result of the search of Wolstencroft's briefcase because "[t]he application of the supervisory powers doctrine in this case would constitute, in essence, a circumvention of the Fourth Amendment standing requirement"). Accord, *United States* v. *Jones*, 433 F.2d 1176, 1181-1182 (D.C. Cir. 1970), cert. denied, 402 U.S. 950 (1971).

B. The Federal Courts Should Not Invoke Their Supervisory Power As A Means Of Regulating The Investigative Activities Of Executive Branch Officers In Ways Not Grounded In Any Statute, Rule, Or Constitutional Provision

We began the Argument portion of this brief by urging that the supervisory power, properly conceived, is not a separate entity but rather a part of

the general judicial power to decide cases and controversies. If this proposition is correct, it helps clarify the nature of the inquiry to be conducted when litigants invite a court to adopt a procedural or substantive rule not prescribed by the Constitution or Congress. To ask whether the courts' "supervisory power" should be exercised in a particular case is really no different from asking whether the subject matter involved is suitable for judicial regulation on the basis of standards developed, not by one of the political branches or by the Founding Fathers, but by the courts themselves. We submit that the conduct of government officers in investigating possible criminal activity is not an appropriate focus for judicial supervision. When a litigant complains of a law enforcement incident or practice remote from the judicial arena, the courts should refrain from adopting evidentiary rules designed to enforce compliance with behavioral norms not established by the Constitution, a statute, or a rule, but merely thought desirable by the particular court having jurisdiction over the controversy.

To be sure, in the present case we assume that the briefcase search violated Wolstencroft's rights under the Fourth Amendment. But, for the reasons already discussed (see pages 34, 36-37, *supra*), that fact alone does not entitle *respondent* to suppression as a constitutional remedy. Respondent did not suffer any invasion of his Fourth Amendment rights. The exer-

cise of supervisory power by the courts below, therefore, must be based on the assumption that, even where challenged police conduct violates no constitutional or statutory standard, exclusion of relevant evidence is an appropriate response if the court, applying its own personal yardstick, finds the officers' conduct sufficiently objectionable. This assumption is incorrect, because the power of the Judicial Branch does not properly extend to the formulation of unsupported rules identifying impermissible law enforcement measures and specifying sanctions for them. Cf. *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977).

This Court has frequently suppressed relevant evidence obtained in violation of the Constitution or a statute or a statutorily authorized rule. Sometimes the Court has explicitly invoked its "supervisory power" in support of these decisions (see, *e.g.*, *McNabb* v. *United States*, *supra*; *Rea* v. *United States*, *supra*; *Elkins* v. *United States*, *supra*), and sometimes it has not (see, *e.g.*, *Miller* v. *United States*, 357 U.S. 301 (1958); *Mallory* v. *United States*, *supra*; *Nardone* v. *United States*, 308 U.S. 338 (1939); *Nardone* v. *United States*, 302 U.S. 379 (1937); *Weeks* v. *United States*, *supra*), but invariably there has been some textual foundation for the Court's conclusion that the police behavior involved was wrongful. The Court has grappled, in such circumstances, with the question whether exclusion is a suitable remedy for the official misconduct that occurred and, in reaching an answer, has relied on the settled judicial power to fashion appropriate remedies for constitutional and statutory violations. See *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395-397 (1971). But the Court has never, in the absence of standards derived from the Constitution or Congress, asserted any such inherent power to declare the investigative conduct of law enforcement officers unlawful. What one commentator said in 1965 remains true today: "Supervisory power has not yet been invoked to exclude evidence obtained through the use of reprehensible police methods which fall short of illegal conduct." Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo. L. J. 1050, 1067 (1965). See also Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1664 (1963) ("Evidence obtained by police action which can be characterized as unfair but which is not, strictly speaking, illegal has not yet been excluded under the aegis of the supervisory power").

At the same time, this Court and the lower federal courts have not hesitated to formulate rules for the governance of judicial proceedings. See the cases cited at pages 14-16, *supra*. See also *Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977) ("It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy"). This readiness to regulate the conduct of the courtroom, even without explicit statutory or constitutional authorization, is hardly surprising in light of the long-

accepted capacity of the courts to prescribe and adjust their own procedures. At the very beginning of the nation, when the Attorney General asked this Court "for information, relative to the system of practice by which the attorneys and counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained," the Court responded:

> The Court considers the practices of the courts of King's Bench and Chancery in England as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.

Rule, 2 U.S. (2 Dall.) 414 (1792). See also Hill, *supra*, 69 Colum. L. Rev. at 194 ("In the Anglo-American system, the judiciary has traditionally been deemed to possess competence to adopt measures to regulate and improve the quality of the judicial process").

The disparity between the frequency and willingness with which the courts have exercised control over matters of judicial procedure and their expressed reluctance to pursue "an undesired and undesirable supervisory role over police officers" (*United States* v. *Janis*, *supra*, 428 U.S. at 458) is not difficult to understand. The courts' hesitation to regulate conduct not directly related to the judicial process reflects not mere prudent circumspection but a proper reluctance to interfere with the coequal functions of the Executive and Legislative Branches and a necessary regard for the constitutional separation of powers. A judicial assertion of a broad discretionary power to exclude evidence not obtained in violation of any statute, rule, or constitutional provision would necessarily entail some encroachment on the prerogatives of the Executive Branch in investigating criminal conduct and initiating prosecutions. See Hill, *supra*, 69 Colum. L. Rev. at 202-207. As Professor Hill has written (*id.* at 205; footnote omitted):

> one may readily infer a major judicial role in the formulation of rules promoting the fair and effective operation of the trial, including rules of evidence for determining the guilt or innocence of the accused. But, under the Constitution and the governing statutes, it is, to say the least, less obvious that the judiciary has authority to pass *independent* judgment on the propriety of investigational and enforcement activity of the executive branch. The constitutional prerogatives of the executive branch in this regard are subject to a large measure of control by Congress, but it is not clear that the courts may go beyond the implementation of constitutional and statutory limitations.

The Sixth Circuit echoed this view in a case decided only 15 months before the present one. *United States* v. *Leja*, 563 F.2d 244 (1977), cert. denied, 434 U.S. 1074 (1978).[15] See also *United States* v.

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[15] The court of appeals in *Leja* stated (563 F.2d at 247):

> [T]he traditional area for exercising [supervisory] powers has been within the framework of judicial proceedings. * * * It is quite another matter, however, to extend

Chanen, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977).[16]

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the court's supervisory power to areas outside this traditional domain of the court. To do so here, where the government conduct does not offend a personal right of any defendant would be directly "to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." * * * A proper respect for the coequal responsibilities of the other branches of government under the Constitution and for the system of checks and balances * * * persuades us to refrain from acting here.

[16] *Chanen* involved alleged prosecutorial misconduct in presenting a case to the grand jury. Defendants moved to dismiss their indictment on the ground that the government improperly read transcripts of previous sworn testimony to the grand jury rather than presenting live witnesses. To the extent that the claim for relief in *Chanen* arose in the grand jury context, the case was similar to *United States* v. *Jacobs*, 547 F.2d 772 (2d Cir. 1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978). In *Jacobs*, the defendant sought to suppress her incriminating testimony before the grand jury on the ground that the prosecutor had improperly departed from the practice of the local United States Attorney's office in failing to give a so-called "target warning" when the defendant appeared as a grand jury witness at a time when she was a subject of the grand jury's investigation.

The questions whether and under what circumstances a court may invoke its supervisory power to regulate the behavior of government officers in the grand jury context are difficult ones, because the grand jury is a hybrid institution. It partakes of both the executive and the judicial power, but at the same time it occupies a constitutionally mandated independent status, free from undue influence by either prosecutors or judges. See *Costello* v. *United States*, 350 U.S. 359, 362 (1956); *Branzburg* v. *Hayes*, 408 U.S. 665, 688, 700-702 (1972); *United States* v. *Calandra*, *supra*, 414 U.S. at 342-344; *United States* v. *Chanen*, *supra*, 549 F.2d at 1312. Although this Court has often referred to the federal district

In the present case, respondent sustained no violation of his Fourth Amendment rights and, accordingly, cannot claim any Fourth Amendment remedy. Notwithstanding the district court's holding that respondent's due process rights would be violated by the introduction against him of evidence derived from

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courts' authority to supervise grand juries sitting within their districts (see, *e.g.*, *Douglas Oil Co.* v. *Petrol Stops Northwest*, No. 77-1547 (Apr. 18, 1979), slip op. 13-14; *United States* v. *Calandra*, *supra*, 414 U.S. at 346 & n.4; *United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973); *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 688, 708), the contours of that authority have not been limned and, in any event, the Court's references seem to contemplate supervision by the empanelling court during the grand jury's term rather than supervision through later judicial rulings in connection with the trial of an indictment returned by a grand jury allegedly influenced by government misconduct. In short, the bounds of the federal courts' supervisory power in the grand jury context are uncertain, and, apart from the statutory contentions advanced by the government in *Jacobs* (to the effect that Fed. R. Evid. 402 and 18 U.S.C. 3501 precluded the suppression of the defendant's grand jury testimony), that case was arguably more difficult than this, because the propriety of independent judicial control over grand jury proceedings is substantially more plausible than the propriety of similar control over police investigative activities. Whatever the correct description of the judicial role in regulating the grand jury, however, these words of the Ninth Circuit in *Chanen* (549 F.2d at 1313; footnote omitted) remain instructive:

> Given the constitutionally-based independence of each of the three actors—court, prosecutor and grand jury—we believe a court may not exercise its "supervisory power" in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the district courts were not required to meet such a standard, their "supervisory power" could readily prove subversive of the doctrine of separation of power.

the search of Wolstencroft's briefcase (Pet. App. 41a-56a), the court of appeals did not rely on any constitutional ground in affirming the exclusion of the critical evidence. As the case comes to this Court, therefore, the court of appeals has asserted a power to suppress evidence, wholly apart from constitutional or statutory standards, solely because it disapproves of federal law enforcement officers' investigative conduct.[17] By doing so, the court has flouted this Court's injunction that the supervisory power be "sparingly exercised" (*Lopez v. United States*, 373 U.S. 427, 440 (1963)) and has displayed an inadequate regard for the constitutional prerogatives of the Executive Branch in fulfilling its law enforcement responsibilities. Cf. *Keim* v. *United States*, 177 U.S. 290, 293 (1900), quoted in *Sampson* v. *Murray*, 415 U.S. 61, 70 n.17 (1974) (courts have no general supervising power over Executive Branch appointments to official government positions). The result reached below is flatly inconsistent with this Court's conclusion in

[17] There is no suggestion in the opinion of either the district court or the court of appeals that the methods used here to secure the information contained in Wolstencroft's briefcase are commonly practiced by government agents in criminal cases. In an attempt to avoid similar misconduct in the future, the IRS has instituted guidelines restricting the use of informants by its agents. IRS Manual Supp. 9G-40 (Feb. 3, 1977). These guidelines require IRS agents affirmatively to instruct informants not to violate the law or any person's constitutional rights. *Id.* at § 3.03. Furthermore, the guidelines require agents to report an informant's violations of local law, discovered by agents in the course of an investigation, to appropriate state agencies for criminal prosecution. *Id.* at § 4.

Lopez, supra, 373 U.S. at 440, a conclusion that fittingly summarizes the government's position in this case:

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

C. The Court Of Appeals' Exercise Of Its Supervisory Power Was Improper Because It Failed To Provide Meaningful Standards For The District Court To Apply

The court of appeals' approval of the district court's use of its supervisory power in this case is especially troublesome because the court provided no effective supervision for future cases. The district court's initial opinion suggests (Pet. App. 58a-61a; footnotes omitted) that federal courts should exercise their supervisory power to exclude evidence whenever it is obtained "by Governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right." The court of appeals offered no hint whether it accepted this broad view or whether it only endorsed the district court's decision to exclude the challenged evidence in this case. If the latter reading of the court's opinion is correct, then district courts in the Sixth

Circuit have been given no guidance whatever regarding the circumstances in which suppression is appropriate.[18] Exclusion of the relevant evidence of respondent's criminal activity would thus penalize society by "deflect[ing] the truthfinding process and * * * free[ing] the guilty" (*Stone* v. *Powell*, *supra*, 428 U.S. at 490) without accomplishing the sole articulated purpose for the exercise of a court's supervisory power. Cf. *Gertz* v. *Robert Welch, Inc.*,

[18] The court of appeals completely ignored the government's contention that the loan guaranty agreement and other relevant evidence were not tainted by the January 1973 search. See Brief for the Appellant 50-62. (The government argued that the grand jury inquiry into the possible improper use of foreign bank accounts by United States taxpayers was a natural outgrowth of the nine-year-old IRS investigation and would have been conducted regardless of the briefcase search. The government also maintained that issuance of subpoenas to the Bank of Perrine was an entirely predictable action by the grand jury, in view of the Bank of Perrine's correspondent relationship with Castle Bank and its role in helping a suspected narcotics dealer establish an account there (see note 3, *supra*), both of which were known to Agent Jaffe before January 1973.) Because the court of appeals did not address this contention, it is impossible to determine whether the court agreed with the district court's conclusion that the government failed to establish that the loan guaranty was discovered independently of the briefcase search or whether the court of appeals simply believed that the question of taint was irrelevant to the propriety of the district court's exercise of its supervisory power. By omitting all discussion of the connection between the challenged evidence and the illegal search, the court of appeals contributed further to the impression that it has asserted an essentially limitless power to exclude evidence whenever it disapproves of law enforcement practices, regardless of the relationship between those practices and a particular criminal proceeding.

418 U.S. 323, 343-344 (1974) (in the law of defamation, striking appropriate balance between rights of press and individual on case-by-case basis "would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application"). If, on the other hand, the former reading of the court of appeals' opinion is correct, then the court has decided that evidence obtained from a deliberate Fourth Amendment violation can never be used by the government, even against someone whose rights were not violated by the illegal search. Such a far-reaching rule would render meaningless an important aspect of this Court's decisions under the Fourth Amendment, and certainly should not be adopted sub silentio by a court of appeals.

The court of appeals' failure to articulate standards for the application of the supervisory power can be expected to produce widely divergent results among trial judges in the Sixth Circuit. Any "didactic" value that an exercise of the supervisory power should have (see *United States* v. *Jacobs*, *supra*, 547 F.2d at 778) is completely missing here because of the uncertain import of the court of appeals' decision. In light of the serious questions a broad application of the supervisory power may raise concerning the constitutional separation of powers, clear explication of governing principles is necessary to ensure that

lower courts do not exceed the limits of their power. The court of appeals failed to appreciate this constraint and instead invoked its supervisory power as nothing more than a label, a judicial device for imposing sanctions where none would otherwise be appropriate. This is a development that has, in our view, been prohibited by Congress in Fed. R. Evid. 402 (see point I, *supra*), and that should, in any event, not be permitted to continue unchecked.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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